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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 784

FRANKLIN L. BATTEN, *Petitioner,*

against

THE UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner, Franklin L. Batten, presents his petition for a rehearing of the Court's order dated March 1, 1965, denying the petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, and in support thereof, respectfully shows:

GROUNDS FOR REHEARING

I. The United States District Court for the District of Columbia was without jurisdiction to enter a Judgment of Conviction against the petitioner since there was no competent evidence proving that the offense alleged in each and both counts of the indictment occurred within the District of Columbia. U.S.C. Const. art. 3, § 2, par. 3; Amend. 6; Federal Rules Crim. Proc. Rule 18, 18 U.S.C. *United States* v. *Johnson,* 323 U.S. 273, 276, 89 L. Fd. 236 239.

The testimony of the prosecution's principal witness, Ralph J. Sines, the one allegedly suborned and corruptly influenced (J.A. 18-41), and that of his wife, Beverly E. Sines, (J.A. 41-44), tends to show that any offense alleged against the petitioner, was committed by him at the home of said witnesses in the State of Maryland, and prior to October 10, 1960, the date of the alleged offenses in the District of Columbia. At the trial, Sines recanted his direct testimony on cross-examination and reaffirmed testimony previously given by him under oath before a Hearing Examiner at the Securities and Exchange Commission on March 6, 1961, in which he was asked by the said Examiner with reference to the date of the alleged offenses, October 10, 1960, "Did you discuss the testimony which you would give before the Commissioner staff on that day?" and Sines answered, "No, I did not. Mr. Batten and Mr. Moore talked. I was not even in the conversation". When confronted with this previous testimony on cross-examination, Sines answered, "If its in my testimony, yes, sir, it must have been correct". (J.A. 39-40).

With this recantation of Sines' direct testimony on cross-examination, a search of the entire record fails

to disclose any of the alleged corrupt influencing or inducement and procurement to perjure to have taken place, if it did, anywhere other than in the State of Maryland. The Court, in its comments on the evidence during the jury charge, referred to the corrupt influencing which took place at the home of Sines, in Maryland (J.A. 87). Nowhere does the Court comment or charge that any of the wrongful acts took place within the District of Columbia. The record is clear on the situs of Sines' home. (J.A. 41). Viewing the prosecution's case in its most favorable light, only the perjury of Sines can be inferred to have occurred in the District of Columbia, and even the venue of that fact is not evidentially laid conclusively in the District of Columbia.

II. In the trial of petitioner on a two count indictment charging in the First Count, the subordination of perjury, and in the Second Count, the statutory offense of obstructing justice before an agency proceeding, which is prohibited by Title 18, U.S.C., 1505, it was plain error for the trial court to deny petitioner's motion for Judgment of Acquittal, notwithstanding the verdict as to both counts, in that the evidence of record did not support the conviction of "Count One, or of Count Two" as a matter of law or fact, when the record discloses that the trial court abandoned the indictment and generally charged the jury on the statutes involved and the testimony developed of events which took place in Maryland (Tr. 333) (Tr. 391, J.A. 84) (Tr. 396, J.A. 87). The court admitted confusion in distinguishing between the two counts of the indictment, stating "Of course, I think this indictment is poorly drawn. That is why I asked what offense was charged in the Second Count. I don't know yet."

(J.A. 74-75), even while it was ruling on petitioner's motion for a Judgment of Acquittal. Before ..... arguments and the jury charge the trial court further attempted to resolve its own difficulties with the indictment and the proof thereunder by advising petitioner's trial counsel that in the event of conviction of both counts, consecutive sentences would not be imposed, so that the problems were only theoretical. (Tr. 329)

While commenting on the evidence of the case during its charge to the jury, the trial court completely ignored and did not comment on Sines' recantation of his direct testimony as developed on cross-examination. (J.A. 85-87). Notwithstanding Sines final affirmation of his sworn testimony before the Hearing Examiner of the SEC on March 6, 1961, wherein he denied any corrupting conversation with the petitioner on October 10, 1960, the date of the alleged offenses, the Court proceeded to instruct the jury and comment affirmatively on the recanted direct testimony. This was plain error, and is a substantial ground available to petitioner to urge upon this Court although not previously presented. The prolixity of the two counts of the indictment, the testimony which dealt with alleged acts occurring in Maryland prior to the dates and district alleged in the indictment, and the recantation of his direct testimony on cross-examination by the principal witness for the prosecution, all tended to inject misunderstanding and confusion into the trial, so that ultimately the trial court charged the jury on the statutes involved and the recanted direct testimony, in complete abandonment of the indictment, without consideration of the venue, and in disregard of recantation of Sines' direct testimony, the most crucial in the trial. Moreover, the trial court did not comment whatsoever on any testimony or evidence consistent with the inno-

cence of the petitioner, such as the fact that legal counsel who accompanied Sines, the admitted perjurer, to the place of the perjury, had instructed him on the day thereof, in the presence of the petitioner to tell the truth (J.A. 46), or that the testimony of the so-called corroborating witnesses Keener and Purl, was as consistent with the innocence as with the guilt of the petitioner insofar as the proof of perjury was concerned.

In view of the foregoing, it can only be speculated as to what evidence and on what theory of guilt the jury returned its verdicts, and how it would have found had there been any consideration given the recantation of the direct testimony of the government's principal witness. This treatment by the trial court, although undoubtedly in good faith, of the indictment, the testimony thereunder, and the petitioner's motion for a Judgment of Acquittal, amounted to plain error, and a denial to the petitioner of a fair trial and due process of law.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

May 10, 1965

Respectfully submitted,

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and
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Certificate of Counsel

I, Edward J. Skeens, counsel for the above-named petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

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Counsel for Petitioner